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No. 263.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

CITY OF SAN ANTONIO, *et al*, APPELLANTS,

VERSUS

SAN ANTONIO PUBLIC SERVICE COMPANY,
APPELLEE.

APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Brief for Appellee.

SATEMENT OF CASE.

We desire here to briefly summarize the issues as we understand them before this court and to call attention to some additional facts.

Under the undisputed facts in this case, and as found by the Master in Chancery and the Court, the plaintiff company could not earn a fair return on the value of its

property if compelled to operate at a five-cent fare. The Master found that "The fact that the company will not during the year 1919 and probably for several years, earn a reasonable return on the value of its property" was "so apparent from the record that it will not be disputed by the defendants." (Transcript of Record, pp. 46, 113, 123-124). The Master's report found that even on the valuation as fixed by him, $4,535,152.88 (Transcript of Record, p. 60), (which the company contended was too low) the earnings for 1919 could not exceed 3.88% and for the year 1918 it was only 4.36% (Transcript of Record, p. 123), and that for several years it had earned a less percentage. (Transcript of Record, p. 123). These findings were not excepted to by the appellants (defendants below). He also found that a fair return was 8%. (Transcript of Record, p. 122). These findings are also referred to and approved by the trial judge in his opinion on the ~~defendant's~~ plaintiffs exceptions to the Master's report. (Transcript of Record, pp. 113-114).

The ~~defendant~~ plaintiff excepted to the valuation as found by the Master as being entirely too low. The court sustained the exceptions to the Master's report recommending that the bill be dismissed for want of jurisdiction, and disapproved and denied that part of his report but found that it was unnecessary for the court to pass on the exceptions as to value because, as stated in the decree passing on the exceptions, "even under the valuation found by the Master and the return under the operating expenses as found by him, the company is not earning a fair return," and therefore deemed it unnecessary to pass on the question whether valuation of the company's property should be higher than that found by the Master. (Transcript of Record, pp. 115-116). The Master's report recommended the granting of an injunction if the court should differ with him on his recommendation that the bill be dismissed for want of jurisdiction—a ques-

tion that was never really referred to him as the court had already passed on that question in overruling defendants' motion to dismiss. (Transcript of Record, p. 31). In this connection, also see the order of the court passing on the exceptions of the Master (Transcript of Record, pp. 115-116) and the written opinion of the court filed in connection therewith. (Transcript of Record, pp. 111-115).

The Master's report has been copied in full in the Transcript of Record (pp. 38-91). Appellants filed no exceptions to it and no exceptions to the order of the court thereon. The trial court found that, even on the valuation as fixed by the Master, the five-cent fare rate was confiscatory and the final decree in this case enjoined the enforcement of the ordinances complained of which were intended to prevent the company from raising its fare. (See Decree, Transcript of Record, pp. 116-117).

QUESTIONS RAISED.

As the case stands before this court it is therefore undisputed that the rate was confiscatory and that appellee (plaintiff below) was being deprived of its property in violation of the Constitution of the United States and was entitled to the relief granted unless it is to be denied that relief because, as contended by appellants:

(1) The court had no jurisdiction. (Brief, pp. 29-37).

(2) The five-cents fare provision of the Franchise Ordinance of 1899 constituted a contract between the City and the Company, which prevented recovery regardless of whether the Company was earning a fair return on its property or not. (Brief, pp. 37-55).

(3) If the Franchise Ordinance of 1899 did not constitute a contract, nevertheless the Company became bound by contract by reason of what is known as the Consolidation Ordinance of 1917. (Brief, pp. 55-58).

(4) That if the fare provision in the Ordinance of 1899 did not constitute a contract, nevertheless it was a condition or limitation which plaintiff accepted and must therefore be denied relief in this case. (Brief, pp. 58-63).

(5) The rate of fare fixed by the Ordiance of 1899 was reasonable at that time and although it has now become confiscatory by reason of conditions arising since that time, the Company is not entitled to relief. (Brief, pp. 64-73).

We will take these contentions up in the order presented by appellants.

Brief of Argument for Appellee.

FIRST: In reply to appellants' First Point, that the court had no jurisdiction, we submit;

(1) Jurisdiction is determined by the allegations in the petition and the defendant's answer cannot be considered in connection therewith.

(2) The petition discloses a case of the taking of plaintiff's property in violation of the Constitution of the United States, and does not disclose, as appellants contend, a contract that would prevent recovery. However, the contract question is discussed more fully under the reply to the Second Point.

SECOND: In reply to appellants' Second Point, that the fare provision of 1899 constituted a contract, we submit;

(1) The five-cents fare provision in the Ordinance of 1899, relied on by appellants, cannot be construed as a

contract, because the City of San Antonio had no power to make such a contract.

(2) Said provision cannot be construed as a binding contract, because the making of such a contract is prohibited by Section 17, Article 1, of the State Constitution, and, if construed as a contract, would be illegal and void.

(3) Said provision was never intended as a contract but as a mere regulation, and the trial judge properly so construed it.

(4) Even though it should be held that the trial judge was not justified in construing the provision as a regulation and not a contract from the terms of the ordinance itself, nevertheless, he had a right to take into consideration the facts and circumstances surrounding the parties at the time of the adoption of said ordinance and the subsequent conduct of the parties in reference thereto in determining whether they intended it as a regulation or a contract, and his finding that it was intended as a regulation is amply supported by the evidence and insofar as it is based on facts outside of the ordinance will not be reviewed by this court.

(5) Even if said provision could be construed as a contract between the City and the Company binding until action with reference to street car fares was taken by the State, it became inoperative as soon as the State saw fit to legislate in regard thereto by passing the Half-Fare Law in 1903.

(6) Even if said provision can be construed as a contract, the City has repealed and repudiated it by the passage of the Half-Fare City Ordinance, the ordinance compelling the free transportation of firemen and policemen, and by other acts hereinafter set out, and is estopped from claiming it to be a contract.

THIRD: In reply to appellants' Third Point, that the Consolidation Ordiance of 1917 constituted a contract, we submit;

(1) The City was under the same disability as to lack of power and under the same prohibition by Section 17, Article 1, of the State Constitution, in 1917 as it was in 1899.

(2) The Consolidation Ordinance of 1917 did not change the relation between the City and the San Antonio Public Service Company a particle from that which had theretofore existed between it and the San Antonio Traction Company—in other words, plaintiff herein assumed exactly the same relation to the City that its predecessor had occupied and none other.

(3) The Consolidation Ordinance affirmatively shows the City did not consider that the matter of street car fares had been or was thereby being fixed by contract, because it plainly shows that the City was reserving the right to regulate same.

FOURTH: In reply to the Fourth Point, that the fare provision constituted a condition which was accepted and which forbids a change in the fare, we submit;

(1) Under our decisions conditions subsequent are looked upon with disfavor and are strictly construed, and a provision will not be construed as a condition but rather as a covenant unless a condition is expressed by clear and unambiguous terms.

(2) The provision does not purport to be a condition or use any language that would justify a court in holding it to be such, and the finding of the trial judge that it was intended a regulation was a proper construction thereof and was amply supported by evidence showing such intention.

(3) The City was prohibited by the State Constitution from imposing any such condition.

(4) The City had no power under its charter to impose any such condition.

FIFTH: We regard the fifth and sixth subdivisions of appellant's brief as related to the other points raised and they are replied to partly under our reply to the other points and briefly under the fifth and sixth subdivisions hereof.

I.

Reply to Appellants' First Point:

Appellants contend that the court had no jurisdiction because plaintiffs' petition showed on its face that it was bound by contract. In view of the rule laid down by this court in Taylor vs. Anderson, 234 U. S., 74, that the jurisdiction of the court is determined from the plaintiffs' statement of his own claim in the bill or declaration unaided by anything alleged as a matter of defense and in view of the allegations in the bill in this case we do not think this contention worthy of serious consideration. It is true the petition set out the Franchise Ordinance in full, but it went further and set up that this provision was never intended as a contract by the parties but was merely intended as a regulation and alleged certain facts intended to show what the real intention of the parties were. It also alleged that if it was intended as a contract that the City was without power to make it, and was prohibited by the State Constitution from making it, and, further, that if it ever was a contract, it had been avoided by the act of the State Legislature in the passage of the Half-Fare Law and had been repudiated by the City by the passage of the Half-Fare City

Ordinance and the ordinance requiring the free transportation of policemen and firemen, and that the City by reason of these and other acts alleged was estopped from relying on it as a contract.

Clearly, the court could not determine by merely looking at the petition, that the fare provision in the ordinance constituted a contract at the time of the filing of the suit regardless of the facts alleged, and therefore properly held that he had jurisdiction in the case. We deem it unnecessary to discuss this point further, especially in view of the fact that the question as to whether the five-cent fare provision constituted a contract will be fully discussed by us under the second point made by appellants.

II.

Reply to Appellants' Second Point:

In reply to the *Second Point* made by counsel in their brief (pp. 37-55) to the effect that the five-cent fare provision in the Franchise Ordinance of 1899 constituted such a contract as to deny the appellee relief, regardless of whether the rate was confiscatory or not, we will here discuss the effect of the provision of the ordinance of 1899, and the Consolidation Ordinance of 1917 will be discussed separately under our reply to the *Third Point* made by appellants in their brief.

The provision of the Ordinance of March, 1899, relied by appellants as a contract is as follows:

> "The said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other." (See Transcript of Record, pp. 5-6, where ordinance printed in full).

We submit that this proposition urged by appellants is unsound because: (1) As found by the trial court, the provision was never intended as a contract but merely as a regulation. (2) The City had never been authorized by the Legislature to make such a contract. (3) The City was prohibited by Section 17, Article 1, of the State Constitution from making such contract. (4) Even if it could be construed as a contract effective until action should be taken by the State, the State, having acted by passing the Half-Fare Law of 1903, it became inoperative. (5) Even if it could be construed as a contract that ever was effective between the City and the Company, it was repudiated and repealed by the City by the passage of the City Half-Fare Ordinance and the Ordinace requiring the free transportation of firemen and policemen, and by other acts of the City to be hereafter referred to, and by reason of these acts, the City is estopped to set it up as a contract.

In discussing the proposition as to whether the five-cent fare provision in the ordinance of 1899 relied on by the City constitutes a contract, we deem it proper to follow the course adopted by this court in the case of Home Telephone Company vs. Los Angeles, 211 U. S., 265, and first refer to the question that must lie at the threshold of the contract question, and that is, as to whether or not the City had the *power* to make such a contract, for, as said by Justice Moody in that case, *"It is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the City."*

We think the record in this case clearly shows (1) not only did the City have no authority to make the contract, but (2) it was expressly prohibited by Section 17 of Article 1 of the Constitution of this State from making such contract.

Taking these questions up in their order, we call the court's attention to the fact that it has been repeatedly held by the Supreme Court of this State that municipalities are creatures of the Legislature and have only such powers as are granted by *express* words or necessarily and fairly implied as incident to the powers so expressly granted and the power must be essential to the declared objects and purposes of the corporation—not simply convenient *but indispensable.* Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the city corporation and the power is denied.

City vs. Railway Company, 66 Tex., 461.
Brenham vs. Water Works Company, 67 Tex., 553.
Galveston vs. Railway Company, 90 Tex., 411.

The powers granted to municipal corporations are strictly construed and a power will be implied only when without its exercise an express duty or authority would be nugatory.

Walschmit vs. New Braunfels, 193 S. W., 1077.
Cleburne vs. Railway Company, 66 Tex., 451.

These authorities simply establish the same rule in this State that is recognized generally by the courts and by this court, and with these principles in view let us look at the charter provisions of the City of San Antonio that were in existence in 1899 when it is claimed the contract was made.

The only provisions of the city charter on which the appellants relied in the court below as giving the power to make a contract with reference to rates were Sections 99 and 100. (See Transcript of Record 119). In their brief here counsel for appellants seem to have abandoned any reliance on Section 99 relative to steam railroads and here urge Section 4, Art. 1, and Section 100, as being sufficient

to grant the City authority to make such contract. Section 4 of Article 1 was not relied on in the lower court and is not included in the statement of the evidence, or master's or the court's findings, and we take it will not be considered by the court here. (See Transcript pages 19 and 121). However, if it be considered, it clearly has no application as it refers only to making contracts with reference to the "property and concerns of the City necessary to the exercise of its corporative administrative powers." Instead of being Section 4 it is really the Fourth Subdivision of Section 1, Article 1. This section contained four subdivisions, the first giving the City the power to sue and be sued; the second, to purchase and hold property for use of the City; third, to sell and convey property; the fourth, as above set out, and the fifth, to have a corporate seal. It is apparent that it relates to the administrative powers of the City with reference to its property and concerns and has no reference to rate regulation. In the court below counsel relied on Section 100 of the Charter and this was the only one that the trial judge deemed it material to consider. (See opinion on motion to dismiss, Transcript of Record, p. 28).

Section 100 is as follows:

> "Section 100. Exclusively to prevent, control and regulate everything connected with city railroads, and make such rules and regulations for the same as the city council may deem necessary."

It seems to us that the decision of this court in the case of Home Telephone Company vs. Los Angeles clearly settles the question that the sections of the city charter relied on by the city were insufficient to give the city power to make contracts fixing street railway fares. In that case the charter provisions of the City of Los Angeles were much broader in this respect than were those of the City of San Antonio. (See 211 U. S., 274, 275). There the charter

not only gave specific power "by ordinance * * * to regulate telephone service and the use of telephones within the city, * * * and to fix and determine the charges for telephones and telephone service and connections", but it contained many other very broad provisions that are copied in the margin on pages 274-5, above referred to. This court held that, while the provisions were ample to give "authority to exercise the governmental power of *regulating charges*," they gave "no authority to enter into a contract to *abandon the governmental power itself*."

In addition to the powers contained in the charter, which are above set out, it was contended that the Broughton Act of the Legislature enlarged the power of the city and in connection with the charter clearly gave the power to contract. This act required "an application for a franchise to be filed, and, in the discretion of the council, published; that the publication must state 'the character of the franchise;' that the City is entitled to a percentage of the receipts; that the grantee must give bond to perform 'every condition of the franchise;' that no condition shall be inserted to restrict competition or favor one person against the other; and that the franchise must be sold to the highest bidder." (Page 276). But, notwithstanding the broad provisions of the charter and these provisions of the Broughton Act, this court held that they were not sufficient to authorize the city to make a contract and that it would not "be supposed that the Legislature intended that so significant and important an authority as that of contracting away the power of regulation as that conferred by the charter should be inferred from the act in the absence of a grant in express words," and indicated that nothing "less than a clear and affirmative expression would be sufficient foundation upon which to rest an authority of this nature."

The language of Section 100 clearly refers to governmental power of regulation and we cannot describe it better

than this court has described it in the above case, when it referred to the provision in the Los Angeles charter, as follows:

> "It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command but not agreement." (274).

The decision of this court in the Home Telephone case has been so repeatedly affirmed by this court that we do not deem it necessary to undertake to recite all such opinions, but will refer to—

> Milwaukee Railway Company vs. Commission, 238 U. S., 181.
>
> Winchester vs. Winchester Water Works, 251 U. S., 192.

The opinion of the trial court in the case at bar has recently been cited with approval by the Supreme Court of Iowa in the case of Ottumwa Ry. & Light Co. vs. City of Ottumwa, 178 N. W., 905, where it was held that a five-cents fare provision in the franchise ordinance did not constitute a contract, and the Supreme Court enjoined the city from interfering with the railway company in raising its fares above five-cents. The court cites numerous opinions from this and other courts to the effect that the right to fix rates cannot be contracted away unless the power to do so is clearly given by the Legislature and says;

> "In fewer words the cases proceed on the general theory that it is against public policy to contract for unchanging rates; that there must be no such contract, because its enforcement might, on the one hand, fasten what proves to be an exhorbitant charge upon the patrons, or, on the other, *prove a rate that will confiscate the property of the Service Corporation.* While there are other lines of rea-

> soning advanced in the authorities, in the main and at the present time, the decisions run on the broad ground that public policy forbids such contracts, unless the Legislature, the ultimate judge of what is public policy, declares unmistakably that such contracts do not offend that policy."

In the case at bar not only has the Legislature not authorized the making of such contract, but the State Constitution, a higher source than the Legislature, forbids it.

In the recent case of Knoxville Gas Company vs. City of Knoxville, 261 Fed., 283, the Circuit Court of Appeals for the Sixth Circuit held that the City of Knoxville, which had much broader charter powers than the City of San Antonio, was not authorized to make a contract as to rates, and that the company was entitled to raise its rates above those fixed in the franchise ordinance.

In the recent case of Southwestern Railway Co. vs. Commission, 219 S. W. (Mo.) 381, the Supreme Court of Missouri held that a provision of the Missouri Constitution, which forbids the Legislature from granting the right to construct street railways within a city without first acquiring the consent of the city, and which is substantially identical with Section 7 of Article X of the Constitution of this State relied on by appellants, did not "in terms nor by necessary intendment, devolve upon the municipalities therein mentioned any part of the unrestricted power of the Legislature to deal with all matters pertaining to the policy and power of the State where not constitutionally prohibited from so doing," and that; "no municipality, either by ordinance or contract, can impose upon a public utility essential to the welfare of the people conditions of operation or maintenance which would confiscate its property or destroy its power to serve the public."

(2) The City was prohibited by the Constitution of Texas, from making such a contract.

Coming now to our contention that the City was prohibited by Section 17, Article 1, of the State Constitution from making such a contract as the City claims this provision of the ordinance to be, we quote that Section of the Constitution as follows:

> "No irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof."

Counsel for appellants have cited certain Texas cases in an attempt to show that this provision of the Constitution does not apply to contracts between a city and a street railway company regulating fares. We will review these decisions later and feel confident that we can show they do not support the claim made by appellants' counsel. This would seem, however, to be an unnecessary task in view of the fact that the Texas courts and this court in the case of San Antonio Traction Company vs. Altgelt, 200 U. S., 304, held that Section 17 of Article 1, of the State Constitution did apply to this very provision of the ordinance of March 16, 1899. The question there under discussion was the validity of the State Half-Fare Law requiring street railway companies to carry children for half fare. The San Antonio Traction Company contested that law and contended that this identical provision constituted a contract with the City for a five-cent fare and that the law was therefore violative of that contract. The case was decided against it by all the Texas courts and by this court. Neither the Court of Civil Appeals in Texas (from which opinion a writ of error was refused by the Supreme Court of the State) nor this court found it necessary to pass on the question as to whether or not the provision was intended as a contract between the City and Company, but the Texas courts and this court held in effect that no mat-

ter what it was, this provision of the Constitution applied to it, and that, therefore, the statute was valid and could be enforced. The plain holding in both the State courts and in this court in the Altgelt case is to the effect that, if the five-cent fare provision here in controversy and also in controversy in that case was intended as a contract, then it came within the terms of Section 17, Article 1, of the State Constitution as being an attempt to make an "irrevocable or uncontrollable grant of special privileges or immunities" that was forbidden by this section of the Constitution. Counsel for the City seem to concede that this decision holds that the Legislature is prohibited by Section 17 of Article 1 from making such a contract, but, notwithstanding that fact contend the City may make it. This is a strange position and it seems to us it ought not to require the citation of authorities to sustain the proposition that what a Legislature is forbidden by a state constitution to do itself it is forbidden to authorize others to do. We have always understood the law to be that what a person does by another he does himself. Clearly, what the Legislature was prohibited to do itself, it was prohibited to do by or through another. Counsel for appellants cannot contest the proposition that, if the City had the power to make the contract, it derived that power from the Legislature, and, this being true, they are forced into the strange and unexplainable position that, although the Legislature of Texas was prohibited by this constitutional provision from making such a contract itself, it could authorize the City to do so. We cannot believe that such a contention merits serious consideration, but we call the court's attention to the fact that the first clause of this section denounces such contracts as illegal and denies the right to make the same and the second clause declares that "all privileges and franchises granted by the Legislature, *or created under its authority*, shall be subject to the control thereof." The Altgelt case

having settled the proposition that, if this fare provision of the ordinance was intended as a contract fixing a fare for a period of forty years, then it constituted an "irrevocable and uncontrollable grant of special privileges and immunities" such as are denounced by Section 17, it necessarily follows that, if it was intended as such a contract, it was illegal and void for it is well settled in this State that contracts made in violation of statutes or of a provision of the Constitution are absolutely void and that no rights whatever can be claimed under them.

Edwards County vs. Jennings, 89 Tex., 618.
T. & B. Ry. Co. vs. Lawson, 98 Tex., 394.
Raywood Company vs. Erp, 105 Tex., 159.

If Section 17 had stopped at the end of the first clause it would have been just as effective because it would have declared "irrevocable and uncontrollable" grants of special privileges illegal. The second clause really adds nothing to its meaning unless it be to make more clear that the section was intended not only to cover the acts of the Legislature but all of its agencies.

Counsel for appellants draw the conclusion (on p. 38 of their brief) that this court in the Altgelt case regarded this provision as a contract, and that the Court of Civil Appeals declined to hold that it was not a contract. We do not so construe these decisions, but on the contrary, regard them as having held in effect that the provision did not constitute a contract. The legal idea of a contract is that it is an agreement binding on the parties making it, and if one of the parties is acting as agent for another, then that it is binding on his principal as well as on the other party. Now, it is undisputed under the record in this case that whatever the City undertook to do it had to undertake by virtue of powers delegated to it by the State

Legislature. It had power to act only in-so-far as the Legislature had authorized it to act, and in-so-far as it was not prohibited by the Constitution from acting. Therefore, if it was intended by the City that this five-cent fare provision in the ordinance of 1899 was a contract, then we have the City acting as agent for the State as one party to the contract, and the Company acting for itself as the other party. If the City had the power to act at all, it had the power to bind its principal because it could only act in-so-far as its principal had authorized. But this court and the State courts directly held in the Altgelt case that it was not a contract binding on the State of Texas—the City's principal. The Court of Civil Appeals in the Altgelt case did not deem it necessary to pass on the direct question as to whether or not it was intended to or did constitute a contract, but simply said even if it "can be deemed a contract" it was contained in an ordinance passed twenty-three years after the adoption of the State Constitution of 1876, and therefore fell under the provisions of Section 17, of Article 1, of the said Constitution and was not binding on the State, and the Company was not entitled by virtue thereof to defeat the enforcement of the State Half-Fare Law. The Texas courts, as well as this court, in the Altgelt case recognized that if it was intended as a contract, then it was one of those "irrevocable or uncontrollable grants of special privileges" mentioned in Section 17, and that therefore it remained subject to the control of the Legislature, and the Legislature had the power to pass the State Half-fare Law. We think the logic of the decisions of all the courts in the Altgelt case necessarily carry the proposition further than simply to say that it remained "subject to the control of the Legislature." Being an "irrevocable or uncontrollable grant of special privileges" (if construed as a contract of fixing fares for forty years), then it was not merely subject to the "control of the Legislature," but

was absolutely illegal because it was expressly prohibited by this provision of the Constitution and being so prohibited it was null and void and not binding on anybody, and no one can assert any right thereunder. This is the clear holding of the Texas Supreme Court in the cases above cited. Therefore we say that this court, having held in the Altgelt case that this fare provision, if construed as a contract, came within the terms of Section 17, Article 1, of the Constitution, it was prohibited thereby and because of this fact was illegal and void and not binding on any of the parties thereto, but left the matter of fixing rates open for future regulation by the City in accordance with the powers given it by the State in its charter.

Referring to the authorities cited by appellants under this point of their brief, we deem it unnecessary to discuss the Detroit and Cleveland cases referred to, because this court has so often explained the holdings of these cases and based them on the fact that these cities had been explicitly authorized by the legislatures of these states to make such contracts and it was not contended in either of them that there was any constitutional prohibition either in Ohio or Michigan against the making of such contracts.

Milwaukee Railway Co. vs. Commission, 238 U. S., 181.

The first Texas case relied on under this point by appellants is that of Mayor vs. Houston Railway Company, 83 Tex., 551. In this connection, we desire to call the court's attention to the fact that this opinion is not by the Supreme Court but by Judge Marr, of Section A of the Commission of Appeals, and to the rule that has been laid down by the Supreme Court of this State to the effect that its adoption of one of the opinions of the Commission of Appeals, or its refusal of a writ of error to a Court of Civil Appeals, does not mean that it approves the reasoning on

all or any of the points discussed by the Commission or Court of Civil Appeals, but merely that it approves the *result* in the particular case. In other words, if a case is affirmed by the Commission or Court of Civil Appeals and the Supreme Court finds from examination of the record that it should be affirmed, it adopts the opinion because the result is correct notwithstanding it may believe that the reasons given for the affirmance are entirely wrong, and that there are other and different reasons why it should be affirmed. Therefore, this court cannot consider the reasoning in opinions, either by the Commission of Appeals or by the Courts of Civil Appeals of this State, as reflecting the views of the Supreme Court of this State or as being an authoritative expression of the law, because, as repeatedly held by the Supreme Court, such adoption or refusal of the writ is no indication that the court approves or intends to adopt the reasoning of the opinion or the grounds on which the affirmance or reversal is based, but merely that the result of the particular case—the affirmance or reversal—is correct.

Avery vs. Popper, 92 Tex., 344.
Aspley vs. Hawkins, 99 Tex., 381.

We will here review the Texas cases relied on by appellants under the point here made.

In the case of Mayor vs. Houston Railway Company, *supra*, the result of the case was clearly right and therefore the court adopted the opinion. In that case the charter was granted by the Legislature in 1870, which was six years before the Constitution of 1876 went into effect, and the provisions of this charter were very broad and the court found clearly conferred upon the City Council ample authority to enter the contract it did enter into. The Commission of Appeals admits in its opinion at the bottom of page 558 that the discussion as to Section 17,

Article 1, of the Constitution of 1876, was *obiter dicta*, and besides there was no such question under discussion as herein involved. The question there under consideration was whether a city could revoke a grant giving the right to lay tracks in the street after same had been accepted and the tracks laid. No question about the regulation of fares was involved.

In this connection, we desire to call the court's attention to the fact that this case was decided in 1892—twelve years before the decision of the Court of Civil Appeals of Texas in the Altgelt case and the refusal of a writ of error in that case by the Supreme Court. If the Supreme Court of Texas had put the same construction on that case as counsel for appellants it could not have refused a writ of error in the Altgelt case. The case was cited by this court in the Altgelt case.

The next case cited is the Rio Grande R. R. Co. vs. Brownsville, 45 Tex., 88, which arose prior to the adoption of the Constitution of 1876, and besides it related to the question of revoking the right given to lay a railroad in the streets and is based on certain State statutes that were then in force. It had no reference to rate regulation and undertook to decide no such question as is here presented.

In Athens Telephone Company vs. Athens, the question involved was whether or not a certain franchise ordinance constituted a contract between the City and the Telephone Company. The court practically based its holding on the ground that this was a local telephone company that derived its authority to go upon the streets from the city and not from the State. We doubt the correctness of the holding that telephone company derives its authority from the city and not from the State, but whether that be correct or not, it is not applicable to the facts of this case because it has been directly decided in this State that street

railway companies derive their authority from the State. As said by this court in the Altgelt case;

> "It is insisted by plaintiff in error that, under Section 7, Article X, of the State Constitution, above quoted, the power to grant street railways property rights and franchises, to construct and operate a street railway within a city, is withdrawn from the Legislature and conferred, if not by express words, then by necessary implication, upon the municipal authorities. We do not so read the section. It merely provides that no such law shall be passed by the Legislature granting the right to construct and operate a street railway without first acquiring the consent of the local authorities, but we see nothing to prevent the Legislature from chartering a street railway, provided such consent be acquired. Such we understand to be the ruling of the Supreme Court of that State in Taylor vs. Dunn, 80 Tex., 652-659 and Mayor vs. Houston Street Railway Co., 83 Tex., 548." (200 U. S. 307-8).

In the case at bar it is shown by the stipulation in the statement of the evidence that prior to 1899 the San Antonio Street Railway Company and the San Antonio Edison Company had been incorporated by the State of Texas, "for the purpose of constructing, owning and operating street railway systems in the City of San Antonio * * *" (Transcript of Record, p. 118).

While street railway companies have to acquire the consent of cities in order to go upon their streets, they still derive their authority from the State. The Court of Civil Appeals in this Athens case misstates the effect of the holding in the case of Galveston Railway Co. vs. Galveston, 90 Tex., 398.

Furthermore, there was no question in the Athens case as to what was meant by the provision of the ordinance under discussion. It clearly provided a maximum charge that could be made by the Telephone Company though apparently did not limit the City's power to reduce the rate

under proper conditions. In addition, it seems to have been doubtful whether the city had been given the right to regulate fares, and therefore it could not have been construed as a regulation. In the case at bar, the City had been given full power to regulate fares and the language of the provision in question is the language of regulation and not of contract or condition. In the case at bar, if the provision should be held as a contract or a condition, then the City would be prohibited thereby from lowering the fare notwithstanding it might have brought more than a reasonable return. Clearly, the Athens case has no application to the case at bar for the reasons stated, but in addition we call the court's attention to the fact that the refusal of a writ of error by the Supreme Court cannot be taken as an approval by that court of the reasoning of the Court of Civil Appeals. The *result* of the Athens case was correct because no contention was made on the appeal that the rate which the City was seeking to retain in force was unreasonable or confiscatory, and we take it that in the absence of such a showing by the Telephone Company, it could not prevent the enforcement of that rate regardless of whether it was a contract, condition or a regulation, because it was the company's duty under the common law, independent of any statute or contract to charge reasonable rates. Therefore the refusal of the writ of error was correct because the result of the particular case was correct, but in addition to the distinction here drawn we call the Court's attention to the fact that in the case of Galveston Ry. Co. vs. Galveston, 90 Tex., 398, the Supreme Court held directly that, in this State, a city has no right to annex any condition to its assent to the use of its streets, *which it has not been authorized by its charter to annex* and that any attempt to do so is void even though accepted by the company, and to construe the refusal of a writ of error in the Athens case (without written opinion) as an approval of

the contentions made by appellants would be, in effect, to hold that the Supreme Court of Texas thereby intended to overrule the Galveston case, and there can be no doubt that had it so intended, it would have written an opinion so stating.

The next case cited is Texarkana Gas & Electric Company vs City of Texarkana, 123 S. W., 213. No application for writ of error was ever made in this case, and hence it cannot be contended that it was ever approved by the Supreme Court, but it may be added here that in the case of Southwestern Telegraph & Telephone Company vs. City of Dallas, 174 S. W., 636, where the identical question was involved as to the right of a city to impose such a tax as was held invalid in the Texarkana case, notwithstanding the provisions in the franchise as to rates, an exactly contrary holding was made by the Court of Civil Appeals at Dallas. In that case the Court of Civil Appeals held that the City of Dallas was without power to fix a rate of charge by contract, and bases this holding on Section 17, Article 1, of the Constitution, and especially cites and relies on the decisions of the State courts and of this court in the Altgelt case. In that case the court said:

> "Thus it is clear that when the Legislature of this State confers upon any municipality the right of local self-government, it can only confer those powers not forbidden by the Constitution and if the appellee did in fact, under the testimony, intend at the time of the original entry of appellants' predecessor and at the several times subsequent thereto, when it permitted appellant to enlarge its equipment, extend its poles, etc., to confer such right free from future regulation and control by the appellee (the City), such intention is wholly ineffective, and immaterial, for the reason that the city was without such authority, even though the Legislature attempted to confer the authority by its charter, since the Legislature itself was incapable of so doing * *"

This latter case raised directly the question as to the power of the City to make a contract with the Company, and held that no such power existed and that if the City ordinance intended to do so it was ineffective and the Legislature could not authorize the City to pass any such ordinance. The Supreme Court refused a writ of error in this case.

The case of the City of Terrell vs. Terrell Electric Light Company, 187 S. W., 966, next cited by appellants, involved no question whatever as to the right of the city to make a contract as to fares. In that case the city contended that under the franchise the company was bound to manufacture its own current and could not purchase it from outside parties. The trial court did not so construe the franchise, but held that under the franchise there was nothing prohibiting the company from purchasing its current from other parties, and this decision was affirmed by the Court of Civil Appeals, hence it can have no applicability whatever to the case at bar.

The last case cited is that of Galveston Railway Company vs. Galveston, 90 Tex., 398, and this is really the only opinion by the Supreme Court of this State, arising after the Constitution of 1876, that is cited on this question by appellants, and we think it holds directly to the contrary of the proposition here asserted by appellants. In that case the City of Galveston had granted the Railway Company the right to lay its tracks on certain streets in the city, and among other conditions in the ordinance had provided by Section 10 thereof:

> "That all the privileges, rights, grants, etc., under this ordinance shall be forfeited if the said Railway Company fails to extend and build their road across the bay within five years after the passage of this ordinance."

This section clearly constituted a condition subsequent, and the question arose as to whether or not the city had any power to impose such a condition, as the railway company failed to make such extension within the five years and the city was seeking to enforce the forfeiture. The Supreme Court first reviewed the statutes of this State to determine whether or not the Railway Company had a right to go upon the streets of Galveston without the consent of the city council, and came to the conclusion that it did not have such right. After reviewing the statutes the court said;

> "By the change made in the statute the Legislature intended to give to towns and cities the unqualified right to consent or refuse without liability for damages."

The court then reviewed numerous cases on the power of cities to impose such conditions subsequent and held that the City of Galveston had no right to couple any such condition with its consent for the railroad company to use its streets. In this connection, the court said:

> "In order to sustain the claim that the city of Galveston had the right to couple with its consent for the railroad company to use its streets any conditions or terms that it might deem proper, we must invest the municipal corporation with such legislative authority over the subject as would make its actionthe source from which the railroad company derives its right to build on the streets or we must conclude that the city had as *full power to contract as a private person has*, and that the ordinance in *question constituted a contract between it* and the railroad company. Neither of these propositions is true as applied to the facts of this case.
>
> The scope of municipal power is well defined by the decisions of this court to be only such as are conferred upon a city or town by its charter, either expressly stated or implied as being necessary to the exercise of some power expressed. Bossburg

vs. McCrary, 77 Texas, 572; Taylor vs. Dunn, 80 Texas, 670." Galveston Railway Co. vs. Galveston, 90 Tex., 410-411.

We feel certain that an examination of the Texas decisions relied on by appellants will show that none of them have any application to the case at bar except the Galveston case and that it holds directly contrary to the contention made by them. We understand the rule of this court to be, that, while it gives much consideration to decisions of the highest court of the State, it determines for itself the question as to whether there was a contract and the obligation arising therefrom.

Detroit Railway vs. Michigan, 242 U. S. 249.
Milwaukee Railway vs. Commission, 238 U. S. 182.

THE PROVISION INTENDED AS A REGULATION AND NOT A CONTRACT.

The trial judge found that the five-cent fare provision in the ordinance of 1899 was never intended as a contract, but merely as a regulation and we submit, (a) that this is the proper legal construction to put on the provision, and, (b) that even if it should not be so construed from the ordinance alone the trial judge had a right to find from the evidence that such was the intention of the parties.

In arriving at this conclusion the trial judge had a right to take into consideration not only the instrument itself but all the surrounding circumstances as well as the want of capacity in the city to make such a contract and its subsequent action with reference thereto as tending to show the real intention of the parties. We take it that this court will not disturb that finding in so far as it is a finding of fact, or in other words, that this court will affirm the judgment of the lower court on this point un-

less it can say by looking at the instrument alone that it constituted a contract binding on the parties. Of course, if the instrument is clear and unambiguous, then no outside matters can be looked to and the construction thereof is purely a question of law, but if the ordinance does not show on its face that this rate provision constituted a contract and if the trial judge had a right, in arriving at the intention of the parties as to whether it was a contract or regulation, to look to extraneous matters, then his finding is not one of law that will be reviewed by this court for as said in Corpus Juris Volume 13, page 785;

> "In order that a pure question of law may be presented the terms of the contract must be uncontroverted and clear and unambiguous * * * The question must be one of construction, not intention."

It seems to us that, looking to the ordinance alone (which is copied in full on pages 2 to 4 of the transcript), it should be construed as not constituting a contract but merely as a regulation because this particular provision of the ordinance speaks in words of command and not agreement. It says the "Companies shall charge five-cent fare, etc." When we look to Section III of the ordinance, in which is taken up the question of furnishing street lights and lights for the city buildings, we find the language of the ordinance changes from that of command to that of agreement, because it says "the Company *agrees* to furnish the City of San Antonio and the City *agrees* to take for five (5) years from June 1, 1899, two hundred and fifty (250) electric arc lights of five hundred (500) watts capacity, for lighting its streets, parks, etc. * * * at Ninety Dollars ($90.00) per lamp per year; the form and minor *details of said contract to be mutually agreed upon.*" In the next clause of Section III the City "reserves the right to renew *this contract* for ten (10) years after the

expiration of *this contract* upon the same price, terms and conditions." In the next clause the Company *agrees* to furnish incandescent electricity to said city for lighting its buildings, etc." Thus it will be seen, that, when the ordinance referred to the rate of fare that should be charged by the company to the public, it used words of command, but, when it came to contracting for street lights and the lighting of city buildings, an abrupt change is made to words of agreement. Furthermore, Section IV of the ordinance provides that the companies shall remain subject to all ordinances of the city except those that are in conflict therewith. In this connection, it will also be noted that in Section III, where the ordinance spoke of a contract, it stated that *"the form and minor details of said contract"* would be mutually agreed upon. This, with the other provisions of Section III, shows clearly that the city council had in mind that it was making a contract with reference to street lamps and the lighting of city buildings whereby it agreed to pay a specific sum for a specific time, but it did not intend, by the language used in Section I, that the "Company shall charge five-cent fare for one continuous ride, etc.," to contract away its power to regulate rates in the future. In the case of Home Telephone Company vs. City of Los Angeles, 211 U. S., 265, this court held that to construe such a provision as a contract had the effect of extinguishing *pro tanto* an undoubted power of government and for that reason, "both its *existence* and the *authority* to make it must *clearly* and *unmistakably* appear, and *all doubts must be resolved in favor of the continuance of the power.*"

If the provision be construed as a contract, as the city claims it should be, then the city would have no right to reduce the rate no matter how large a return the Company might have been able to make thereunder. Now, we take it that if the prices of material and labor had gone down

instead of up and the city had reduced the fare from five cents to three cents and had been able to show that the company could make a fair return under the three-cent fare, we would have had very little show, in view of the decisions of this court in Altgelt case and the case of Home Telephone Company vs. Los Angeles, *supra*, and other cases following it, to contend in this court that this provision was a contract or that the city was thereby prohibited from reducing the fare.

In the case of Rogers Park Water Co. vs. Fergus, 180 U. S. 624, the village of Rogers Park had granted the Water Company a thirty-year franchise and Section 12 of this franchise ordinance provided that;

> "The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, etc. * * *"

Then followed a schedule of the rates for each particular purpose.

It was contended by the company in that suit that Section 12 of the ordinance constituted a contract and the question before the Supreme Court of Illinois and before this court was whether it constituted a contract or a mere regulation. Both the Supreme Court of Illinois and this court held in that case that it was not a contract but a regulation and this court said, referring to the language of the ordinance;

> "This, will be observed, is the language of command not of contract; of limitation on power, not a bargain giving power. The right to charge the inhabitants of the village for the water supplied to them resulted from the right to construct and maintain the system. Section 12 *was a regulation of the right.* There is no stipulation that it will be the only instance of regulation; that the power to do so is bargained away, and that the conditions that determined and justified it in 1888 would re-

> main standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us to so hold it." (180 U. S., 630).

In the same case the Supreme Court of Illinois, speaking of this same Section 12, said;

> "This provision of the ordinance had no effect to establish a contract between the appellant company and the village that the individual inhabitants of the village should and would pay such rates for the period of 30 years, or any fixed period of time, *but was simply a declaration* on the part of the village that *such rates were reasonable.* The legal effect was to establish, *prima facie,* that the corporation, in order to discharge the duty it owed to the public, must supply the commodity it had been created to supply at the prices named in the ordinance. *It was a mode of regulating and enforcing the discharge of a legal duty,* not a proposition looking towards a contract. No contract was necessary to create an obligation on the part of the corporation to supply water at a reasonable rate, for that rested upon it as a duty." 53 N.E. 363

We call the court's attention to the fact that Section 12 of the ordinance in the Rogers Park case could more easily be construed as having been intended to fix the rate by contract for the entire franchise than the provision relied on in the case at bar because it provided that the company "shall charge" the rates therein named, *"during the existence of this franchise* * * *" In the case at bar there is no provision that the rates shall be charged for any length of time or during the life of the franchise as in the Rogers Park case, and hence it seems that it would be more unreasonable to hold this a contract and not a regulation than it would have been to so hold as to the ordinance in the Rogers Park case.

There is another rule of law that should be adverted to in connection with the construction of this provision of the ordinance, and that is, where a provision in an instrument

or statute or ordinance is susceptible of two constructions, one of which places it in opposition to and the other in harmony with the Constitution, the latter construction will be adopted.

Ennis Co. vs. City of Ennis, 105 Tex., 72,
12 C. J., pp. 539-540.

To construe this provision as a contract will be to declare it something that is forbidden by Section 17, Article 1, of the State Constitution, referred to above, and, furthermore, will hold that the city was doing something which it had not been authorized by the Legislature to do and as creating something that was absolutely null and void. On the other hand, to hold that it was a regulation not only places it in harmony with the Constitution of the State, but as the exercise of a power that the Legislature had specifically given to the city.

Therefore, we submit that the trial judge correctly held that the provision as to a five-cent fare was intended merely as a regulation. In view of the decisions of this court on this subject, and considering the constitutional provision of the State, which the court had to take judicial notice of, it seems to us that the court was warranted in so construing the provision by looking to the ordinance alone and that it is not susceptible of any other construction. But even if it can be held that the court could not say from the ordinance itself that it constituted a regulation and not a contract, then he had a right to take into consideration all the surrounding facts and circumstances and the subsequent conduct of the parties with reference to the said provision of the ordinance in arriving at the intention of the parties. If he did not have the right to find from the ordinance itself that this provision constituted a regulation, then he had a right to take into consideration the facts,

that, (1) the City had not been delegated any power by the State Legislature to make contracts as to street railway fares but that its only power with reference to street railways was to regulate them; (2) when the ordinance was passed on March 16, 1899, the two street railways, whose properties were consolidated by said ordinance, were then operating upon the streets of the city by virtue of consent theretofore given, (Transcript of Record, p. 118), and at that time and prior to the passage of the ordinance here in controversy there was an ordinance in effect providing for a five-cent fare with transfers to other lines of the *same company*, and that this ordinance has never been repealed, (Transcript of Record, p. 121), and that the fare provision here in controversy provides that the transfer should not be merely to the lines of the same company but "to or from either line to the other"; (3) in 1903, only a little more than four years after the passage of the franchise ordinance, the City of San Antonio passed an ordinance reducing the fare as to children under twelve years of age and as to school children under seventeen years of age from five cents to two and a half cents, and requiring the company to comply with the provisions of the State Half-Fare Law (Transcript of Record, pp. 16 and 119); (4) on July 24, 1907, the City of San Antonio passed an ordinance requiring the transportation of members of the police and fire departments free, (Transcript of Record, p. 120); (5) in July, 1917, when the Consolidation Ordinance was passed the city included in that ordinance a provision requiring the San Antonio Public Service Company to keep separate books and accounts as to the Transportation Department, showing the "income, costs of operation, maintenance and permanent improvements" of that department, and that such books should be kept open to the inspection of the representatives of the city.

It is shown from the record above referred to that prior to the passage of this ordinance two different street railway companies were operating in the city and that there was a five-cent fare ordinance in effect, but that it only required transfers to and from *lines of the same company*, whereas the fare provision of the franchise ordinance of March 16, 1899, here in controversy, provides for transfers "to or from either line to the other." Before the passage of the ordinance transfers were required only to and from the lines of the same company, but after its passage transfers had to be given not only to the lines of the same company but also the lines of the other company. Now it is a reasonable deduction from this fact that the intention of the city and the company in inserting the five-cent fare provision in the ordinance of March 16, 1899, was not to change the status that had theretofore existed between the city and the street railway companies from that of *regulation* to that of *contract* as to fares, but simply to provide for and require transfers to be given not only to lines of the same company but to the lines of the other company. There was already an ordinance in effect requiring a five-cent fare, and it was clearly not the purpose to destroy this ordinance but to leave it in full force except where it varied from said provision. The ordinance then in force regulating fares provided a penalty of not less than Twenty-five Dollars ($25.00) or more than Two Hundred Dollars ($200.00) for its violation, (Transcript of Record, p. 20), and it certainly was not the intention of the city to destroy the penalty provision of this ordinance by the reference to the fare in the franchise ordinance, but this would be its effect if construed as counsel for appellants contend it should be.

Furthermore, the court had a right to take into consideration the subsequent conduct of the city with reference to this ordinance as throwing light on whether it

regarded it as a regulation or a contract, and we find that in 1903 it passed a half-fare ordinance reducing the fare of children from five cents to two and a half cents and requiring the company to comply with the State Half-Fare Law; that in 1907 it passed an ordinance requiring the free transportation of policemen and firemen and in 1917, when the Consolidation Ordinance was passed, it required the San Antonio Public Service Company to keep separate books and accounts as to its Transportation Department showing the "income, cost of operation, maintenance and permanent improvements" of that department, and further required said company to keep said books open to the inspection of the representatives of the city, thus showing that the city considered even at that time that the status between it and the street railway company as to fares was not one of contract but one of regulation, because this would have been a useless requirement if the company had a contract authorizing it to charge a fixed fare of five-cents during the life of its franchise regardless of whether it made more or less than a fair rturn on its property. Counsel for appellants say the fare provision, under the decision of the Altgelt case, was not binding on the State, but was binding on the city. If it was binding on the city, then why did the city want to require the company to keep said books or leave them open to the inspection of the city. If it admitted that it was bound by a contract such books would have been of no concern to the city although they might have been to the State. The evidence clearly shows that the city regarded this as a regulation and not as a contract, and the court had a right to so find from such evidence even if he was not required to so construe the ordinance itself, and we take it that this is a finding this court would not review.

Even if the provision could be construed as a contract between City and Company, binding until action by the State, it became inoperative when the State passed the Half-Fare Law.

We do not see how it is possible to hold that the provision was ever at any time a contract but, if by any stretch of reasoning such holding can be made, it would seem that it must necessarily remain a contract only so long as the State had not seen fit to legislate with reference to such fares, and the State having taken up said subject by passing the Half-Fare Law in 1903, such a contract could not remain longer in force. To hold that such a provision was a contract and that it remained in force regardless of regulation by the State would put the street railway company in an anomalous condition. The Texas courts and this court have held that the Half-Fare Law is valid and that no matter what this ordinance may be it does not interfere with the power of the Legislature to legislate with reference to rates. If we undertook to defeat the Half-Fare Law on the ground that the company is not earning a fair return on its property the State would answer that the Half-Fare Law does not prevent us from raising our fares but simply provides that the fare for children shall be one-half of that for adults. Now, when we undertake to raise fares the city says "You cannot do this because you are bound by a contract." The appellants take the position in their brief that we might attack the State Half-Fare Law if we can show it is confiscatory, but we cannot avoid or contract with the city. (Brief, pp. 77-75). The result of this would be to have the city ordinance override the will of the Legislature—that very thing the Altgelt case held could not be done. If the city's contention that this provision is a contract should be upheld in this case, then the result of the opinion in this case and the Altgelt case would be that the company cannot defend against the State Half-

Fare Law or any other similar laws the Legislature may see fit to pass, because the city had no power to bind the State or to put the matter of fares beyond its control, but notwithstanding this fact, and the fact that the Legislature may require children to be carried at half-fare or workmen and other people to be carried at less than the regular fare during certain hours or may require the company to sell tickets at less than the cash fare or make other such regulations, still the company could not raise any fare above five cents because it had contracted with the city. It seems to us the position is too preposterous to require argument.

If it can possibly be held that this provision ever constituted a contract binding between the city and the company until the Legislature saw fit to enter the field of fixing rates of street car fares, then we see no reason why the rule applied by this court in Southern Railway Co. vs. Reid, 222 U. S., 424, to the effect that while states may make regulations as to interstate commerce in the absence of regulation by Congress, yet, when Congress once enters the field and exerts its authority, it takes all power in regard thereto away from the State. We do not wish to be understood as recognizing the proposition that the city may legislate in the absence of legislation by the State, because we think such a proposition entirely unsound as the City must derive its authority to legislate from the State, but we merely wish to call the court's attention to the anamolous and perilous position public service companies would be placed in by such construction as that contended for by appellants or by holding that such a provision as here involved is a contract as to rates notwithstanding the fact that it does not bind the State or prevent it from legislating on the same subject. It is a well settled proposition of law that a city ordinance is inferior to a state statute, and, if either statute or the ordinance must give way, that the ordinance is the one compelled to yield. Marquis vs. Tele-

phone Company, 154 N. W., 927; Carlton vs. Boudar, 88 S. E. (Va.), 174.

In this connection also see Milwaukee Ry. vs. Commission, 238 U. S., 179.

Even if the provision could be construed as a contract between City and Company at the time of its passage, the City has repealed and repudiated it by the passage of the Half-Fare City Ordinance, the ordinance compelling free transportation of firemen and policemen, and by other acts and is estopped from claiming it to be a contract.

The plaintiff set up these facts and alleged that if the provision was ever a contract it had been annulled by the city and the city was estopped by reason of such facts from now claiming that the same is a contract (Paragraph 10, Plaintiff's Petition, Transcript of Record, p. 9).

The passage of these ordinances by the city was undisputed. (Transcript of Record, pp. 119-120).

While we are confident that this court will never hold that the provision was a contract, yet, if such holding could be made, then it seems that it would be difficult to find a clearer repudiation of a contract by one of the parties to it than has been shown in the case at bar, and we submit that in any event the city is estopped from relying on a contract which it has so frequently repudiated and which it has so often treated as a regulation. It is apparent from the record in this case that even before the Altgelt case was filed the city had repudiated any idea that this provision was intended as a contract, if any such idea ever existed, and if it was a contract, then it breached and abrogated it by the passage of the Half-Fare Ordinance in 1903 and by ratifying the State Half-Fare Law and seeking to aid in its enforcement. If it was a contract, it further breached and abrogated it by the passage of the Police and Firemen's Ordinance and by the Consolidation Ordinance

of 1917, which required the company to keep books that clearly could be for no other purpose than to aid the city in regulating fares. We do not care to argue this proposition further, because it is apparent that the city has never at any time regarded the proposition as a contract but has changed the rate of fare whenever it saw fit to do so.

III.

CONSOLIDATION ORDINANCE OF 1917.

Counsel for appellants contended under Point III that even though the city was without authority and the five-cent fare provision in the ordinance of March 16, 1899, did not constitute a contract, yet it was under no such disability in 1917 when the Consolidation Ordinance was passed and therefore because of that ordinance appellee was bound.

Our reply to this is:

(1) The city was under the same disability as to lack of power and under the same prohibition by Section 17, Article 1, of the State Constitution in 1917 as it was in 1899.

(2) The Consolidation Ordinance of 1917 did not change the relation between the city and the company a particle, but left the relations between the San Antonio Public Service Company and the city exactly the same as they had theretofore been between the San Antonio Traction Company and the San Antonio Gas & Electric Company.

(3) The ordinance shows the city then had in mind that the right to regulate fares had not been contracted away and provisions were made therein looking to such regulation.

Taking these questions up in the order stated, we submit that Section 5 of Article 11 of the State Constitution, which

is spoken of by appellants as "The Home Rule Amendment", and which was adopted in 1912, made no change either as to the power of the city in reference to the matter under discussion or the prohibition under which it was resting; and the city had no further power in 1917 than it had in 1899. That portion of "The Home Rule Amendment" to the Constitution, which is applicable here, is copied by appellants on page 55 of their brief and is as follows:

> "Sec. 5. Cities having more than five thousand (5000) inhabitants may, by majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the legislature of this State."

It will be seen at a glance that this provision of the Constitution did not invest the city council with any other authority than that which is possessed at the time of the adoption thereof. It provided a method whereby city charters might be adopted or amended, *"by a majority vote of the qualified voters of said city."* In other words, it simply provided that after that date charters might be amended and certain powers given to the city council "by a majority vote of the qualified voters" instead of having to be amended, as theretofore, by the Legislature. Prior to the adoption of this amendment to the constitution cities had to have their charters amended by the Legislature and after that could amend them "by a majority vote of the qualified voters of the city"—but the Home Rule Amendment did not grant any additional powers to the city council itself. In this connection, we desire to call attention to the further fact that this "Home Rule Amendment" specifically provided that such charters or amendments adopted by the voters

should be subject to such limitations as might be prescribed by the Legislature and that they should not contain anything inconsistent with the Constitution or the general laws of the State.

It will be seen at once that even under this provision the qualified voters of the city could not have amended the charter so as to give the city council the power to contract with reference to fares because this would have been inconsistent with and was prohibited by Section 17, Article 1, of the State Constitution which is still in existence. Furthermore, if such power *could* have been given by a vote of the qualified voters it has not been shown, nor could it have been shown in this case that it *had* been given. On the contrary, the record affirmatively shows that in July, 1917, when the Consolidation Ordinance, on which counsel for appellants are relying under this point, was passed, the only provision in the charter which it is contended gave the city council any authority in respect to this matter was Section 95 which is identical with Section 99 of the old charter. In the statement of the evidence it is stipulated, after setting out the enactment of the Consolidation Ordinance and the facts with reference thereto that;

> "At that time (July, 1917), the City Charter gave the Commissioners power under Section 95: 'To exclusively control and regulate everything connected with street railways and to make such rules and regulations for the same as the Commissioners may deem necessary'." (Transcript of Record, p. 121).

No attempt was made on the trial of this case to show that by any amendment of the city charter the voters of the city had attempted to enlarge these powers in any way whatever, but on the contrary, the record affirmatively shows that the voters had not seen fit to enlarge these powers and that the only section giving the commissioners or council

power with reference to street railways was Section 95, which is identical with old Section 99 that was in existence in 1899. Furthermore, the Home Rule Amendment itself shows that the power could not have been given the commissioners by vote of the people with reference to fares as that was still prohibited by Section 17 of Article 1 of the State Constitution.

(2) It is difficult to understand how it can be contended that the ordinance of July 10, 1917, (which is set out in full on pp. 22-23 of the Transcript of Record) changed the status as to the regulation of fares or put the San Antonio Public Service Company in any other position as to its transportation department than that which had been occupied by the San Antonio Traction Company. It is apparent from the reading of the ordinance that it was the purpose of the city and the company that the San Antonio Public Service Company should assume exactly the same status as to its transportation department as the Traction Company had theretofore held. Section 2 of the ordinance, on which counsel for appellants so earnestly rely, simply says that:

> "All the limitations, duties, contracts, forfeitures and obligations imposed on or required of said companies at this time shall be imposed on and required of the San Antonio Public Service Company."

It is clear that it was not the purpose of this ordinance to change the terms or conditions of any existing contracts or regulations or obligations that the San Antonio Traction Company was at that time subject to, but simply to transfer these contracts, regulations, limitations or obligations, whatever they might be, to the San Antonio Public Service Company. If the San Antonio Traction Company was subject to a contract at that time the ordinance imposed that contract on the San Antonio Public Service Company. If

the San Antonio Traction Company was subject to regulations at that time, the ordinance imposed those regulations on the San Antonio Public Service Company, but it is apparent that the city was not undertaking to, nor was it the intention of the parties to change the nature of any regulation or obligation—to change any regulation into a contract or any contract into a regulation. If there were contracts before the passage of this ordinance, they remained contracts afterwards. If they were regulations before the passage of this ordinance, they remained regulations after its passage. The only effect was to transfer these contracts, limitations, regulations, forfeitures or obligations, whatever they might be, in the same form, from the shoulders of the San Antonio Traction Company to the San Antonio Public Service Company.

The trial judge in the court below was so clearly convinced from the reading of this Consolidation Ordinance of 1917 that it made no change in these matters but merely transferred the same regulations and obligations that had been imposed on the San Antonio Traction Company to the San Antonio Public Service Company, he did not even deem it necessary to discuss the question further in his opinion, and we do not feel that it needs further discussion here other than to call the court's attention to the language of the ordinance itself.

In this connection, however, we desire to call the court's attention to the fact that this ordinance shows that neither the city nor the company had in mind at that time that the city and the San Antonio Traction Company were bound by a contract fixing fares at five-cents.

Sections 3 and 4 show that the city had clearly in mind that its right to fix street railway fares had not been *contracted* away but that it still had the right to *regulate* same.

Section 3 specifically provides that the gas and electric department of said company shall be kept separate and dis-

tinct from the transportation department to the "same extent as if said branch of its service were still separate and distinct corporations."

Section 4 required the Company to keep separate books and accounts "showing the income, cost of operation, maintenance and permanent improvements of each of its plants, to-wit, its gas plant, its electric light plant and its *transportation* plant, which books shall be open to the inspection of the City Commissioners or their authorized representatives." (Transcript of Record, p. 23).

If the city and the company were bound by a contract as to the rate of street railway fares, fixing their fare at five cents for the balance of the life of the franchise, then why did this ordinance require that it should keep books and accounts showing the income, cost of operation, maintenance and permanent improvements not only as to its gas and electric departments, but also as to its transportation department, and why should these books be required to be open to the representatives of the city? If the city and company were bound by a contract as to fares, or it was intended by this ordinance they should in the future be bound by such a contract, why should the company be put to the expense of keeping all these items and why should it be required to show them to the city? If they were bound by a five-cent fare contract, as counsel for appellants contend, for the balance of the life of the franchise, or it was intended by this ordinance to so bind them, of what concern would it be to the city to know this information? It would be wholly immaterial to it whether the Company made or lost money, for in no event would the City Commissioners or Council have the power to regulate or change the fare. The very language of this section shows plainly that it was the purpose of the city to require books to be kept showing this information as to the transportation department as well as the other departments, and reserve

the right of inspecting them *in order that the city might have this information* so that it could *exercise* the power given it by its charter to *regulate* fares and that the parties understood at that time that this right had not been contracted away.

IV.

Reply to Fourth Point in appellants' brief (pp. 58-63) to the effect that the fare provision constituted at least a condition or limitation annexed to the grant that appellee is estopped to contest.

As a *dernier* resort appellants fall back on the proposition that, even though the provision does not constitute a contract, it is a condition or limitation subsequent—in other words, that, although it be true that the city and the company could not by contract fix the rate of fare because the city had not been authorized by the Legislature to make such a contract and because the making of such contract was prohibited by the Constitution, nevertheless, the city could attach a condition subsequent that would bind the company. We submit that there are at least four insuperable objections to this proposition advanced by appellants, viz:

(1) The trial court held that the provision was intended as a *regulation* and in addition to this being the proper construction of the ordinance itself, the other evidence in the case is ample to support this finding. We have discussed this point fully under the contention made by the city that the provision was intended as a contract *(supra,* p. 27), and the same reasoning applies here and need not be repeated, because if the provision was a *regulation,* as found by the trial court, it necessarily follows that it could not be a condition.

(2) Our courts do not look with favor on conditions subsequent, for, as said by the Supreme Court of this State in South Texas Telephone Co. vs. Huntington, 104 Tex., 350;

> "To constitute a condition subsequent upon which a forfeiture may be declared because of a failure in its performance, the language must be clear, and the condition must be created by express terms or by clear implication and it must be strictly construed. If there be doubt as to the meaning of the language, it will be construed as a covenant rather than as a condition."

To the same effect is the decision of the same court in Ryan vs. Porter, 61 Tex., 109, where it is said;

> "If the instrument will bear any reasonable construction that will defeat the springing of an implied condition subsequent, at law as in equity, that construction will be adopted. Estates upon implied condition subsequent cannot be created by deed, except where the terms of the grant will not admit of any other reasonable construction."
>
> It is much more reasonable to construe the provision either as a regulation or as a contract than as a condition subsequent. It does not state for how long the five-cents fare shall be charged and does not carry any penalty or indicate any intention of forfeiture and under the uniform rule as to the strict construction against conditions subsequent it would be impossible to so construe the provision under consideration.

(3) *That which was made illegal and which the city was prohibited by the State Constitution from doing directly, it cannot do indirectly.*

Section 17, Article 1, forbids the making of any such contract and therefore construed as a contract it would be illegal, but counsel for appellants take the position that, although the city could not make such a contract, it could reach the same end by calling it a condition subsequent. If this were true, then all statutes or constitutional pro-

visions prohibiting certain contracts could be evaded by construing such contracts as conditions subsequent—in other words, the parties could make a grant or contract that is forbidden by the constitution or by the statutes, and, when this contract was attacked in the courts as illegal, they could meet the objection by calling it a condition subsequent. We take it that, if parties undertook to do this by the plainest kind of English, they would make but little headway in the courts. For example, if a contract that was in violation of the anti-trust law, or any other State law, was made, the parties could not avoid the vice of illegality in it by saying, "This shall not be construed as a contract but shall be a condition subsequent." Such an attempt to evade the statute would be regarded as puerile. The thing that the constitution denounced, and that public policy denounces, is the fixing of a fare for a long period of time so that it cannot be changed or so that the governmental power of regulation is surrendered, and, whether this end is reached by contract or condition subsequent, it would be equally illegal.

It should be noted that the provision in question does not undertake to fix a maximum fare, but it says that the company "shall charge five cents for one continuous ride, etc. * * *" If it had said that the company should not charge exceeding five cents, there might be some plausibility in arguing that it left the city the right to lower the rate under proper conditions, but if this is a condition subsequent, then it must be binding on both parties and the city would violate it if it undertook to lower the fare below five cents no matter what return the company might be earning. Furthermore, if construed as a condition subsequent, it must be held that the company would have violated it if it had voluntarily reduced the fare to four cents, because the language of it is that the company *"shall charge five cents for one continuous ride* * * *" Such con-

dition does not imply a reservation of the city's right to lower the rate should the situation make a lower rate reasonable; on the contrary, the language of the provision precludes the idea that any such reservation was intended. The condition (if a condition) is, that the company shall charge a five cents fare; and that condition would be violated if the city should lower the fare. If the city holds the condition valid, and demands that it be enforced against the company, then the company has the legal right to require that the condition be enforced according to its terms, which are, that the company shall have a five-cents fare, all the time, and this would deprive the city of the right to lower the fare should the situation become such that a lower fare would be reasonable. But the city cannot, by contract, condition, or otherwise, deprive itself of its said right to lower the fare in a proper case, and it follows that the condition is invalid. If the company can be bound by the condition at all it can be bound only according to its terms; if the condition cannot be enforced according to its terms, then it cannot be binding on the company. The company cannot be bound by this provision, as a condition, to charge not exceeding a five-cents fare, if the city is not bound by it not to lower that rate of fare. Mr. Dillon in his work on Municipal Corporations (5th Ed.), Sec. 1229, says that conditions subsequent, if valid, are binding on the city as well as the company.

It would be no answer to the above argument to say that the city has not undertaken to lower the rate; it is sufficient that the city has the legal right to, and may, hereafter lower the rate. The existence of this right destroys the condition, for the reason that it makes the condition uninforcible and nullifies the right accruing under it to the company to charge a five-cents rate for the term of the franchise. Besides, the city has in fact nullified the

condition by passing the Half-Fare Ordinance and the policemen's Ordinance, etc.

(4) The city had no power to impose any such condition subsequent.

This point is directly decided by the Supreme Court of Texas in the case of Galveston Railway Co. vs. Galveston, 90 Tex., 398, where the Supreme Court reviewed numerous decisions throughout the country with reference to both steam and street railway companies, and held that in Texas, cities had no right to impose such a condition. Referring to the case of Taylor vs. Dunn, 80 Tex., 670, and to "The Appeal of the City of Pittsburg," 115 Pa. St., 4, the court said:

> "Both cases rest upon the sound proposition that a city may annex to its consent for the use of its streets terms or conditions which require the performance of a railway company of those things which are *within the power* of the municipal corporation to regulate and enforce against a corporation or individual occupying such streets with the city's consent, *and that no other terms can be prescribed by the city under such circumstances* * *" A city council having control over its streets by virtue of its charter, when called upon to give consent for a railroad company to build upon its streets, may prescribe terms which embrace the doing of all those things necessary to the preservation of the streets and crossings for the public use; however, this is not done by virtue of a power arising out of the right to deny consent to use the street, *but is the exercise of a power conferred by its charter*, which power might be as well exercised after the consent is given as at the time * * *"

In that case the court held that the statutes required the consent of the city before the railroad could go on its streets, and that the city had the power to absolutely refuse consent (404), and that the consent of the city was a condition precedent prescribed by the statute before the railwas company could go upon the streets of the city. In the

case at bar the constitutional provision, heretofore quoted, requires the consent of the city before a street railway company incorporated by the State can go upon its streets. This consent the city may give or refuse, but, as we have heretofore shown, the authority to go upon the streets of the city comes from the Legislature subject to the consent of the city. The procuring of this consent is a condition precedent to its going on the streets, but when the city gives this consent it can only affix such conditions to it as the Legislature has authorized it to affix, for, as said by the Supreme Court in the Galveston case above referred to;

> "But, to the condition precedent prescribed by the statute (that is, the consent of the city) the City of Galveston has attached a condition subsequent, the breach of which, it is claimed, has the effect to annul not only the consent of the city, but also to set aside and annul the right acquired under the laws of the State. In this case the railroad company was in possession of the streets of the City of Galveston under a grant by the State upon a condition precedent, which had been fulfilled; (i. e., the consent of the city had been obtained) to which the city answered, that, although this is true, the ordinance of the city prescribed a condition the breach of which destroyed the right of occupancy under the statute. This cannot be true unless the ordinance of the city is superior to the statute and the creature may become greater than the creator." (p. 413).

The construction we have put on the Galveston case is the same construction placed on it by Mr. Dillon in his work on Municipal Corporations (5th Ed.), Sec. 1229.

In the Galveston case referred to it was very clear that the city intended the clause in question as a condition subsequent, and that a forfeiture should follow. There was no ambiguity about the language of the provision, but the Supreme Court held that the city had not been authorized by its charter to annex any such conditions subsequent and that therefore it was null and void.

In the case at bar there is nothing in the language of the provision to indicate that it was intended as a limitation or condition subsequent, but, even if it can be held that such was the intention, then a complete reply is that the city was not authorized to annex any such condition and therefore if construed as a condition subsequent it would be void. The record in this case shows that the street railway companies were incorporated by the State for the purpose of owning and operating street railways in the city of San Antonio, (Transcript of Record, p. 118), and that the city gave its consent to go upon the streets prior to the enactment of the ordinance of March 16, 1899, and that said street railways were being operated on the streets of San Antonio prior to March 16, 1899. Having given its consent, it could annex only such conditions as its charter authorized it to annex, and it was not only not authorized by its charter, but was forbidden by the Constitution to annex any such condition as here contended for. We have reviewed the Texas cases cited under this point and believe we have shown that they can have no application to the case at bar. The city was not only without authority but was forbidden by the constitution to annex any such condition and the language of the provision does not justify a holding that it was intended as a condition subsequent.

V.

Reply to Appellants' Fifth Point (Brief, pp. 64-73).

This sub-division of appellants' brief presents nothing which is not covered by the points previously presented except perhaps the Master's suggestion of the proposition of law that, as the rate was reasonable when fixed by the ordinance of 1899, no relief could be granted the company even though, through changed conditions arising thereafter, it became unable to earn a fair return on its property under

said rate, if such conditions were brought about by circumstances over which the city had no control—in other words, as the increased cost of labor and material, necessary in operating the public utility company, was not brought about directly by the city itself, there could be no relief. Stated in different language, that an ordinance once reasonable is always reasonable, and a utility company can have no relief against it unless the conditions causing it to become unreasonable are brought about by the rate making body itself.

The only reference the trial judge saw fit to make to this contention in his opinion overruling it was that it was "not supported by direct authority." (Transcript of Record, p. 114). We do not believe such a proposition needs any further consideration here, but we will refer the court to the cases of Castle vs. Mason, 110 N. E., 463; Lincoln Gas Company vs. Lincoln, 250 U. S., 256; Darnell vs. Edwards, 244 U. S., 564; Knoxville vs. Water Company, 212 U. S., 15; San Diego Land Company vs. City, 174 U. S., 767; Municipal Gas Co. vs. Commission, 121 N. E. (N. Y.), 772.

A complete answer to the contention is made in the language of this court in the Lincoln Gas case, as follows:

> "Perhaps it *would go without saying*, but in our opinion the decree ought to be modified so as to permit complainant to make another application to the courts for relief against the *operation of the ordinance hereafter*, if it can show as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, cost of operation, and the current rates of return upon capital as they stand *at the time of the bringing of the suit* and are likely to continue thereafter, that the rate ordinance is confiscatory in its effect *under the new conditions*. It is a matter of common knowledge, that, owing principally to the world war, *the cost of labor and supplies of every kind have greatly advanced since the ordinance was adopted and since this cause was last heard in the court below*. And it is equally well known that annual returns upon capital

> and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and public utilities a few years ago furnishes no safe criterion for the present or for the future."

In the Knoxville case, 212 U. S., 15, it is also said;

> The precise subject of inquiry was *what would be the effect of the ordinance in the future?*"

It is well settled that in all rate cases the question is not what were the conditions at the time the ordinance was passed, but the conditions at the time of the inquiry.

As said by this court in Lincoln Gas Company vs. Lincoln, 233 U. S., 357-358, what the company was entitled to was "a fair return upon the value of the property *at the time of the inquiry.*"

If this contention suggested by the master and promptly disapproved by the trial judge, but here relied on by appellants, is correct, then, apparently, this court and the courts throughout the country have been trying rate cases on the wrong theory. The courts have uniformly, in the trial of rate cases, inquired into the conditions existing at the time of the trial—the questions as to the value of the property, what was a fair rate of return, etc., have all been determined as of the date of the trial. If the proposition of law here advanced be correct, then the courts have been laboring under great error, for they should have made their inquiries not as of the date of the trial but as of the date of the passage of the ordinance regulating the rate no matter how long before the trial such ordinance was passed, whether twenty or fifty years. We shall not discuss such a proposition further.

VI.

Under the Sixth Sub-division of appellants' brief (pp. 73-75) the remarkable contention is made that, if the company was not making a fair return on its property, it should have attacked the Half-Fare Statute and that under the decisions of the Texas courts and this court in the Altgelt case, on making that showing, it could defeat the operation of the State Half-Fare Law but that it cannot in any event interfere with what they claim to be "a contract of the city."

If this were true, then, as said by the Supreme Court of Texas in the Galveston case above referred to, "The creature would become greater than the creator."

The State Half-Fare Law does not limit the fare to any specific sum, but says that the fare for children shall be one-half that charged adults, and we anticipate that, if we had undertaken to attack the Half-Fare Law, the representatives of the State would have met us with the very sound proposition that the State statute is superior to a city ordinance and especially superior to any ordinance or any supposed contract which a city might have attempted to make without authority from the Legislature and in direct violation of the State Constitution. We take it that in such a suit the State would have said, and justly so, "If you are not making a fair return you should raise your fares to such a point as will bring a fair return. The State statute does not prevent you from doing this and when such raise is made, you are entitled under the State statute to raise the fare for children to not more than one-half of the new fare fixed for adults." We have no doubt that in such a suit the courts would have promptly denied relief and have held that the action of the State Legislature could not be made to yield to any action on the part of the city council. If the Altgelt case does not decide this, we are at a loss to know what it does decide.

We have discussed this matter further under the Second Point in this brief.

CONCLUSION.

The equities of this case are clearly with the appellee. Under the law and in equity and in good conscience the appellee is entitled to earn a fair return on the value of its property, and it is undisputed here that it is being denied this right. The master found that this was so clear from the evidence that it would not be disputed by the city, and this finding was not excepted to by appellants. The city is now seeking to deny the relief granted on the ground that it has a "contract" with appellee to charge only a five-cents fare notwithstanding the fact that the record shows, without dispute, that through all the years that intervened between 1899 and 1918 it regarded and treated the provision as a mere regulation which it could change at will—that in 1903 it passed a Half-Fare Ordinance reducing the fare for children to two and a half cents; that it ratified and helped to enforce the State Half-Fare Law; that in 1907 it passed the ordinance requiring the free transportation of policemen and firemen, and in the Consolidation Ordinance of 1917 it inserted the provision showing that it was still asserting the right of regulation. It is only when the company finds, after pocketing its losses for several years, that it cannot make anything like a fair return on its property, that the city conceives the idea that it has a contract. When the predecessor of this appellee was asserting in the Altgelt case that the provision was a contract, the city was not found rushing to aid in the enforcement of its sacred obligation (?), but had theretofore repudiated and was at that time repudiating the idea that the provision constituted a contract, and had theretofore asserted and was still asserting, and continued to assert until 1918, its right to regulate

the fare. If we can be accused of inconsistency, in now asserting what we believe to be the law in view of the Altgelt case and the numerous cases of the Supreme Court (most of which have been decided by this court since 1903) simply because the representatives of our client's predecessor contended in the Altgelt case that the provision was a contract, then we think we may at least be permitted to reply to appellants, not in Latin phrase, as resorted to by them, but in the plain old English saying that "People who live in glass houses should not throw stones." In asserting the propositions here contended for, we are quite satisfied that we are following the law as laid down by this court in the Altgelt case and in the numerous cases decided since that time and which have very much clarified and elaborated the law of rate regulation since the time the Altgelt case arose. The city has changed front, after treating this provision as a regulation for eighteen years, not in order to follow the law, but in defiance of those decisions and it has no standing at law or in equity.

We respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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